IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

No. 492

NAHUM BIRNBAUM, M. J. LUTTERMAN, CO-PARTNERS, COMPRISING A PARTNERSHIP UNDER THE NAME AND STYLE BIRNBAUM & CO., BIRNBAUM AND CO., A CO-PARTNERSHIP, CONSISTING OF NAHUM BIRNBAUM AND M. J. LUTTERMAN, JAMES A. COLE, AND CENTRAL HANOVER BANK AND TRUST COMPANY, AS TRUSTEE, ETC.,

Petitioners,

vs.

CHICAGO TRANSIT AUTHORITY, ET AL.,

Respondents.

BRIEF OF BONDHOLDERS' COMMITTEES IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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DATED January 16, 1948.

THE SHORTHORP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

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MAY IT PLEASE THE COURT:

Respondents, Bondholders' Protective Committees, represented in these proceedings the owners of millions of dollars in securities of the companies forming the Chicago Surface Lines. In reliance upon the decrees of the District court and the orders and mandates of courts of review adjudicating adversely to petitioners the contentions now urged with respect to the modification and relaxation of the injunctional provisions of the order of sale of March

7, 1947, respondents and others have at this date acquired valuable vested rights by virtue of the consummation of the plan of reorganization and sale of the local railway systems to the Chicago Transit Authority.

These respondents desire to join in the brief submitted by the Chicago Transit Authority and, without burdening the Court by repeating the questions presented and a further statement, to submit the following by way of supplement:

1. That there is no basis whatsoever for the filing of the *instant* petition is demonstrated by the following facts, all of which occurred in 1947:

(a) On January 4th the Circuit Court of Appeals rendered its opinion and judgment confirming orders of the District court approving and confirming the plan. *In re Chicago Rys. Co., et al.*, 160 F. (2d) 59. The Circuit court, in its decision, held in response to the contentions then made by petitioners, that they were deprived of no contractual rights contained in the 1907 ordinance and that the Bankruptcy court could deal with these alleged rights in the Chapter X proceedings. (See page 66, 160 F. (2d) 59.)

(b) On April 3d, the last day but one allowed for an appeal, these petitioners filed a petition for certiorari in this Court seeking a review of the Circuit court's order of January 4th.

(c) On April 11th these respondents petitioned this court to advance the hearing on the application for certiorari because of the great public interest involved. That motion was allowed and on April 14th this Court denied the petition for certiorari. (Nos. 1200-05, this Court.) Reference to the petition and replies of respondents in that application to this Court will show that the matter of petitioners' asserted rights under the 1907 ordinance were fully discussed and argued.

(d) On March 7th, the District court entered an order of sale setting the sale for April 22d.

(e) On April 4th, the last day but two allowed for

an appeal, these petitioners filed notices of appeal from the order of sale entered March 7th.

(f) On April 16th, these respondents presented an emergency motion to the Circuit Court of Appeals asking dismissal of the appeals.

(g) On April 21st the Circuit Court of Appeals advanced the motion for hearing and on the same day dismissed the appeals.

(h) No petition for certiorari from this order of dismissal was ever filed.

2. The properties were sold to the Authority on April 22d and on May 3d an order confirming the sale was entered by the District court. No appeal has ever been taken from that order.

3. In August the Authority completed the sale of its revenue bonds to the public in the amount of $105,000,000 and it became apparent that the sale would be consummated. At that time all litigation pending in the upper courts had been finally disposed of.

Petitioners, on September 3d, filed petitions in the District court seeking to modify certain provisions of the order of sale entered on March 7th. This was the order from which petitioners had previously appealed and which the Circuit Court of Appeals had dismissed. The petition of September 3d sought to modify the injunctional provisions of the order of sale and raised the same questions as those involved in the previous appeal from the order of sale.

On September 12th the petitions to modify were heard in the District court and orders entered disallowing and dismissing them.

4. Thereupon, all final preparations were made to consummate the sale. Orders of transfer were entered; forms of deed and bills of sale were approved; $105,000,000 was on deposit in Chicago banks; and the District court set

eleven o'clock on the morning of September 30th as the time for the Authority to pay the purchase price in court and receive delivery of the necessary documents of transfer (Tr. 55, 56).

These facts were well known to petitioners.

In a last desperate attempt to prevent consummation of the sale, at about 2:15 P. M. on September 29th, the day before the sale was to be concluded, they filed notices of appeals from the orders of the District court entered on September 12th refusing to modify the order of sale.

Prompt action of an emergency character was necessary to secure a review of these appeals before eleven o'clock on the following morning. Otherwise, the sale could not have taken place and the entire plan would have collapsed.

The plan had received the approval of:

(a) The District court;
(b) City Council of the City of Chicago;
(c) The Illinois Commerce Commission;
(d) Voters of the City of Chicago;
(e) Federal Works Administration;
(f) Securities and Exchange Commission;
(g) Surface Lines securityholders participating in the plan;
(h) The Circuit Court of Appeals for the Seventh Circuit.

This was the first time in twenty years of unceasing effort that such united agreement had been achieved. It would never again be duplicated. Everyone connected with the enterprise knew that if this sale were postponed and this plan failed, the solution of Chicago's long-delayed transportation tangle would be indefinitely postponed and the future growth of the city seriously curtailed. That was the situation which confronted the Circuit Court of

Appeals on the morning of September 30th, when it heard respondents' motion to dismiss the appeals.

The emergency was deliberately created by these petitioners. They waited until the last minute to file the appeal, hoping thus to prevent the sale.

It was an emergency much more acute than that which prompted this Court to advance the hearing on the former application for certiorari and to dismiss it within forty-eight hours from the filing of respondents' answer and without waiting for the record to be printed.

5. The proceedings before the Circuit Court of Appeals complied with all requirements of due process and the rules of Civil Procedure.

The records before the Circuit court were adequate to demonstrate the following at the time the emergency motion to dismiss the appeals came on for hearing: (a) that the asserted rights of petitioners under the so-called 1907 ordinance to institute suits against the City of Chicago and the Chicago Transit Authority had been definitely decided adversely to them in *In re Chicago Rys. Co. et al.*, 160 F. (2d) 59 (certiorari denied by this Court Nos. 1200-05); (b) that the orders of the District court denying the petitions to relax or modify the injunction restraining petitioners from instituting suits against the City of Chicago and the Authority were non-appealable ones; (c) that petitioners, having been found to have no further equity in the debtor, 160 F. (2d) 59, had no appealable interest; (d) that the order of March 7, 1947, containing the injunctional provisions, had been the subject of an appeal by petitioners and that that appeal had been dismissed by the Circuit court and that no application for a writ of certiorari had been made to this Court, and (e) that the points and issues involved in the *instant* appeals and motion to dismiss were clear. Every pro-

cedural and substantive right given petitioners by law and the Rules of Civil Procedure was preserved and safeguarded.

Rules 73 and 75 of the Rules of Civil Procedure prescribe only the procedural steps to be taken in order to procure a review of an order or judgment of a lower court and to perfect an appeal. Rule 75 (j) expressly provides that if prior to the time the complete record on an appeal is settled and certified, as provided in other rules, a party desires to docket the appeal "in order to make in the appellate court a motion for dismissal, * * * the clerk of the district court at his request shall certify and transmit to the appellate court a copy of such portion of the record or proceedings below as is needed for that purpose." This rule has none of the limitations urged by petitioners. Its language is clear and unambiguous.

Pursuant to Rule 75 (j) respondents brought before the Circuit court on their motion to dismiss the appeals, the following (Tr. 49, 50):

(a) The petitions of the present petitioners filed in the District court moving, in substance, for the entry of an order or orders of the court amending and relaxing the injunctive provisions contained in the order of sale. These petitions fully informed the Circuit court as to the nature, character and extent of the relief prayed (Tr. 19-33; Tr. 2-16).

(b) The three orders of the District court dated September 12, 1947, denying the petitions to modify the injunctive provisions and to set for hearing and adjudication the claims filed in the proceedings by the City of Chicago.

(c) The notices of appeal of petitioners, filed September 29, 1947.

The aforesaid matters were certified by the Clerk of the District court and transmitted to the Appellate court pur-

suant to "designation of record on appeal" filed in the District court by all respondents (Tr. 48-51).

Respondents further filed in the Circuit court (Tr. 55-66) their motion to docket and dismiss the appeals and filed suggestions in support of the said motion (Tr. 59). Petitioners filed suggestions in opposition to appellees' emergency motion to docket and dismiss the appeals (Tr. 67). The Circuit Court of Appeals itself entered an order on September 30, 1947 (Tr. 73) ordering that the appeals be docketed in that court. In addition, there was accorded to both petitioners and respondents time for oral arguments (Tr. 78-101).

While petitioners labor the technical point that the Circuit court could not pass upon the issues before it because the points upon which they relied for a reversal were not before the court, the oral argument clearly shows that full opportunity was given petitioners to state their position in support of their appeals; to read cases which they believed upheld their contentions (Tr. 78), and to point out the errors they felt had been committed below.

During the oral argument counsel for petitioners stated (Tr. 84):

> "* * * This case presents a very simple, narrow question, and a question which we submit that your Honors have never decided. We are seeking here to relax a broad injunctional order of the United States District Court * * *. That order prohibits us from suing anybody. (Tr. 85.) * * * Now, that is all we are seeking to do. We are seeking to relax that injunctional order * * *."

It is evident, therefore, that the nature and purpose of the appeals was made known to the Circuit court, not only by the then record before it and the arguments of counsel, but also by the records of the prior appeals herein-

before set forth and concerning which the court was warranted and justified in taking judicial notice.

The Circuit court was satisfied that the records before it were adequate to permit of passing upon the motion and that was sufficient to satisfy every procedural and jurisdictional requirement. *Karl Kiefer Mach. Co.* v. *United States Bottlers Machinery Co.*, (CCA 7, 1940), 113 F. (2d) 356, wherein the court stated that restriction of the record to relevant material "is to be commended." *Lynch* v. *Durfey*, 108 F. (2d) 181, relied upon by petitioners, is not in point for the reason that on the motion to dismiss an appeal in that case *no* portion of the record had been certified and transmitted to the Appellate court and the court itself held that there had been no compliance with Rule 75 (j) and there was, therefore, nothing before it which permitted of passing upon the motion.

Furthermore, the judges of the Circuit Court of Appeals well understood this whole matter and the questions which had been decided in the prior appeals as a reading of the stenographic report of the argument on the motion to dismiss demonstrates (Tr. 78-101). Judge Evans, Presiding Justice of the Circuit Court of Appeals, made the following comments (Tr. 97):

> "• • • The question for us to determine is how serious are the points and how serious is the emergency. That involves the exercise of judgment by us, and the mere fact that it is a very large amount is not going to control. The very fact that you argue is not going to control. It is a question of how much merit you have and whether it is a case that we should take and look at the grounds and *go through it again* and then go on up to the Supreme Court. The Courts are practical bodies. They have to meet a situation. (Italics ours.)
>
> "This matter has been in the Courts for very many years, and when a party waits until the last minute

before he takes his appeal thinking he is going to block them, the Court can consider that fact along with the other facts.

"He didn't have much time. The fellow was set. He has a serious matter. When somebody walks in and throws a monkey wrench in the machinery and makes no bond to protect anybody from the consequences, we have a right to consider the question and act promptly."

• • • • •

"Judge Evans: In view of the repeated hearings that you had, was there anything to prevent you from taking an appeal on the day the order was made?

Mr. Sears: On what date?

Judge Evans: September 12th.

Mr. Sears: (Tr. 98.) Well, there wasn't. I suppose they possibly could have. I am rather new in the case. I think I got in the case around the 14th.

• • • • •

Judge Sparks: The Court dismissed the appeal on April 21st and you sought to have it reviewed.

Mr. Sears: We sought a review by certiorari?

Judge Sparks: Yes.

Mr. Sears: The record doesn't indicate that.

Judge Sparks: You didn't?

Mr. Sears: That's right, your Honor. That appeal was from the order of sale.

Mr. Schroeder: That is the same order they are talking about."

• • • • •

6. The instant appeal is an attempt again to review the order of sale entered March 7, 1947, from which order an appeal was taken and dismissed. The Court is being asked once more to review that order—that order from which a prior appeal has already been dismissed and from which no petition for certiorari was filed.

The substance of petitioners' contention is that the City of Chicago was obliged to pay the purchase price provided

for in the 1907 ordinance of approximately $172,000,000 and that they have a right to bring suit on that contract. The identical point was made in the original appeal to the Circuit Court of Appeals and in the appeal from the order of sale. Judge Kerner well understood this as appears from the following (Tr. 96):

> "Judge Kerner: Didn't you contend in the original appeal that the city was obliged to pay the purchase price provided by the ordinance. That was your argument. That was your contention.
>
> Mr. Sears: That was one of the points, your Honor.
>
> Judge Kerner: We in our opinion said that was not so."

The action of the Circuit Court in dismissing the appeals finds substantial basis in the authorities. Irrespective of all the contentions of petitioners, the short and complete answer to the entire situation is that the appeals in question were taken from *non-appealable orders.*

Petitioners were not, therefore, in any event entitled to a hearing on the merits. It is evident from the petitions and the oral arguments that the primary aim of petitioners was to seek, either a summary relaxation in the injunctions or a rehearing before the District court, in order to procure modifications thereof. The petitions, whether called petitions to modify a judgment or order or to vacate the same or for a rehearing, all fall within the rule that an order denying them is not an appealable order. In *Wayne United Gas Co.* v. *Owens-Illinois Glass Co.*, 300 U. S. 131, 137, 81 L. ed. 557, 561, this Court stated:

> "The granting of a rehearing is within the court's sound discretion, and a refusal to entertain a motion therefor, or the refusal of the motion, if entertained, is not the subject of appeal."

See, also:

Brockett v. *Brockett*, 2 How. 238, 11 L. ed. 251.
French v. *Jeffries*, 161 F. (2d) 97.

7. The Circuit Court of Appeals in its original opinion affirming the order approving the plan of reorganization, 160 F. (2d) 59, held that "the appellants had no equity, there was no value to be protected, and they are not entitled to vote." In this state of the record they have no right or standing at all to make an objection in these proceedings. In other words, their appealable interest had been extinguished. *In re Michigan-Ohio Bldg. Corp.* (C. C. A. 7th), 117 F. (2d) 191.

This is made clear by the following excerpt from the argument before the Circuit Court of Appeals on the motion to dismiss the present appeals (Tr. 86, 87):

> "Judge Kerner: Suppose the record shows you have no equity. What do you say about that? • • •
>
> Judge Evans: I was going to ask the same question. Your right to appear depends upon your showing or a showing that you have an interest here; and if you did not have any interest, although the other cases may be of interest academically, you are not in a position to advance them.
>
> • • • • •
>
> Judge Evans: Well, insofar as this particular action is concerned, the Court denied you that right because you had no interest to protect. Whether they decided correctly or incorrectly is not in question. You took it to the Supreme Court on a writ of certiorari and it was denied.
>
> Now, then, you are just asking us to throw that case aside and proceed as though that was just a waste of paper (Tr. 88).
>
> • • • • •

Judge Evans: You have no more right to get it (the injunction) relaxed than you had a right to come in Court to begin with, because the Court found you lacked interest and you are out. Even if the Court erred in doing so, it becomes final. Do you understand that?"

* * * * *

The sale has now been completely consummated, the purchase price paid, the title to the properties delivered to the purchaser, and the proceeds of the sale are in the process of being distributed to the securityholders entitled thereto under the plan. It is clear that this situation cannot be unscrambled. It is equally clear that all the rights claimed by the petitioners under the 1907 ordinance or otherwise against the properties of the debtor, the City of Chicago, and the Transit Authority have been fully passed upon by the courts.

Furthermore, the action of the District Court in denying the petitions to relax the injunction and the order of the Circuit court in dismissing the instant appeals conformed to the prior opinion and holdings of the Circuit court in 160 F. (2d) 59 and in the prior order of that Appellate court dismissing petitioners' appeal from the sale order of March 7, 1947. There is nothing further to review. Under such circumstances the motion to dismiss the appeals was properly allowed. *In re Chicago, M. St. P. & P. R. Co.*, 145 F. (2d) 299 at 301.

The question as to whether petitioners had any rights under the 1907 ordinance and whether the institution of suits by them against the City of Chicago and the Authority would interfere with the provisions and requirements of the plan of reorganization and the execution thereof were matters solely for the Bankruptcy court to decide.

In determining such matters and in holding that petitioners should be enjoined from filing separate suits which would interfere with the plan and the execution thereof, the Bankruptcy court was exercising exclusive jurisdiction and invaded no powers of state courts. Petitioners' contentions that the matters in question are for the state courts to decide are obviously without merit.

8. This case does not fall within Rule 38 of this Court.

This case presents no question of general importance sufficient to warrant the issuance of the writ here sought. There is not involved any question of lack of uniformity of decisions, nor a conflict with prior decisions of this court or the state courts; nor has the Circuit Court so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court as to call for an exercise of this Court's power of supervision. No important question of federal law exists, nor was there a departure from usual or accepted procedure. The sole basis for the petition is that petitioners disagree with the decision of the Circuit court.

The purpose of the writ is not to give the defeated party another hearing. See *Magnum Co.* v. *Coty*, 262 U. S. 159, 163 (1923). The court said:

> "* * * The jurisdiction to bring up cases by certiorari from the circuit courts of appeals was given for two purposes: first, to secure uniformity of decision between those courts in the nine circuits; and, second, to bring up cases involving questions of importance which it is in the public interest to have decided by this court of last resort. The jurisdiction was not conferred upon this court merely to give the defeated party in the circuit court of appeals another hearing. Our experience shows that 80 per cent of those who petition for certiorari do not appreciate these necessary limitations upon our issue of the writ. * * *"

We, therefore, pray that the petition for certiorari be denied.

Respectfully submitted,

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